

PARLIAMENTS ON A SPECIAL MISSION: OVERSIGHT OF IMPLEMENTATION OF SPECIAL INVESTIGATIVE MEASURES

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Parliaments on a special mission: oversight of implementation of special investigative measures

Special investigative measures (SIM) are no novelty in the work of security actors, but over the past few years they have attracted significant public attention. Technological development has enabled the state to commit the most serious intrusion of privacy of its own and other states' citizens so far, at the time when the respect for human rights in the large part of the world has become one of the proclaimed basic principles of the constitutional framework. Sensitivity of the data collected in this way means that the SIM are an aspect of the security actors' work which is exposed to a very high corruption risk.¹ On the other hand, the nature of the security threats which are predominant in the 21st century (above all, terrorism and organized crime) justifies the diligence in application of SIM. In order to prevent abuse, it is necessary to have the application of SIM 1) regulated by the law and 2) subject to external oversight (courts, independent state bodies, and the parliament).

This paper will give the overview of the legislative and institutional arrangements and practices of parliamentary (or parliamentary-related) oversight of SIM implementation in the European countries. The paper does not intend to offer a comprehensive classification of oversight arrangements or an exhaustive analysis of the practices. The intention is rather to provide an overview of the current trends and achievements in the oversight of SIM implementation in the work of security and intelligence services and the police, as well as to identify, without deeper analysis, some factors which have impact on effectiveness of this kind of oversight.

¹ It is important to keep in mind that the application of the SIM invades the privacy of the citizens, and that these measures enable gathering of the internal data on the affairs of the legal entities. This opens up the possibility of blackmailing, information trading and so on. Furthermore, there is a risk of collection of data not relevant for the criminal proceedings or national security, or the risk of submitting of inaccurate or incomplete data. More on risks of corruption in security sector in: Petrović, P. (ur.). *Korupcija u sektoru bezbednosti Srbije*. Beograd: Beogradski centar za bezbednosnu politiku, 2013.

What are special investigative measures?

It is necessary to define here what we mean under special investigative measures. Given that these measures are numerous and varied and that they constantly evolve, it is hard to offer one precise definition.² It is important to emphasize that under special investigative measures we understand measures applied for two basic purposes: in criminal investigation and for protection of national security. However, in some cases these two purposes overlap.³ The Council of Europe accepts secrecy as the common denominator for the “special investigation methods” used in the criminal procedure, accepts their secret nature and the fact that their application could infringe fundamental rights and freedoms.⁴ The secret nature of the data collection is the basic characteristic of the SIM, not only when it comes to the criminal procedure, but also when these measures are applied for protection of the national security, as well as during surveillance of financial transactions. The laws of some countries offer more specific definitions of SIM. Most laws include: secret surveillance of telecommunications and mail, secret surveillance and audio-visual recording inside facilities, secret surveillance and recording of persons at open and public spaces, secret insight in personal data records and secret purchase of documents and objects.

2 Committee of Experts on Special Investigation Techniques in Relation to Acts of Terrorism (PC-TI). Conclusions of the third meeting, Strasbourg 24.9.2003. <<http://goo.gl/52RXx0>> (coe.int pdf)

3 Especially when it comes to terrorism, organized crime and crimes against the constitutional establishment and state security, where the cooperation between the police and security services is required. See: Milosavljević, B. Ovlašćenja policije i drugih državnih organa za tajno prikupljanje podataka: domaći propisi i evropski standardi. In: Hadžić, M. i P. Petrović (ur.) (2008). *Demokratski nadzor nad primenom posebnih ovlašćenja*, Beograd: CCVO, 59-75: 60.

4 In the mentioned 2005 Council of Europe Recommendation this definition is elaborated to a certain extent: special investigative techniques are techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons. See: Council of Europe Committee of Ministers. Recommendation of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism. Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies. Rec(2005)10.<<http://goo.gl/X3QiRb>>.

What European standards are relevant for parliamentary oversight of implementation of SIM?

The European guidelines governing SIM implementation do not explicitly mention the need for parliamentary oversight. However, it is necessary to emphasize that the relevant European Union law does not apply outside of the scope of the EU competence, e.g. when it comes to the national security. The Directive 95/46/EC on data protection envisages the national bodies which oversee collection, processing and exchange of the data for the purposes of prevention, investigation and detection of criminal offences and conducting criminal proceedings.⁵ The Directive on privacy and electronic communications establishes the principles based on which the member states can monitor electronic communications or undertake other measures to protect public and national security, as well as within the implementation of the criminal law. However, it explicitly refrains from interfering in the state's activities in these areas.⁶ The most detailed recommendation that governs the application of special investigative measures was adopted by the Council of Europe in 2005, but it only refers to the implementation of such measures in criminal investigations. According to the recommendation, the member states should undertake appropriate legislative measures in order to ensure that the judicial institutions or other independent bodies have appropriate control of implementation of special investigative techniques, through sanctioning of these measures, oversight during their implementation and subsequent control. The parliaments are not explicitly mentioned as the external oversight actors when it comes to the use of special investigative techniques.

5 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. [online] <<http://goo.gl/1vTxf>>(lex.europa.eu). However, it is interesting that the proposal for amendments to this Directive from 2012 (the adoption is still being postponed) excludes its application on the processing of the data in the European institutions such as Europol and Eurojust. See: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.

<http://goo.gl/XZNUZt> (lex.europa.eu)

6 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:EN:NOT>

Why are parliaments important oversight actors?

There are reasons for which the parliaments should not be overlooked, not as the alternative to the judiciary and independent state bodies, but as the actors of effective oversight. The parliaments have several features that make them desirable in this type of oversight. Firstly, oversight of the executive power⁷ is one of the basic functions of the parliament, which should contribute to the greater responsibility of the institutions of the executive power, including the security sector institutions. The fact that the parliaments have been directly elected contributes to the legitimacy of the oversight. The parliamentary oversight is done primarily through the working bodies, where, typically different political parties are represented – both the majority and the opposition, which makes the oversight relatively balanced. Finally, specialization of the committees for monitoring of certain policies allows for the oversight of SIM in a wider context of implementation of specific policies and functioning of institutions. In that sense, the purpose of parliamentary oversight is not to detect individual cases of abuse of power within the institutions' work, but to establish systemic flaws in SIM implementation and to propose solutions to tackle identified problems – through recommendations to the institutions on implementation of the existing laws or through improvement of the legislative framework, where necessary.⁸

How can parliamentary oversight be done?

Apart from deliberating on the laws and issues important for the society, the basic functions of the parliament include control and oversight. In order to perform these functions, the parliament can have at its disposal a wide range of instruments, such as parliamentary questions, interpellation, establishment of the investigative committees, public hearings, as well as the obligation of the executive power to report on its activities to the parliament. Specialized parliamentary bodies (committees, boards, commissions) have the most prominent position in the oversight of the exe-

7 According to the Law on the National Assembly, the basic functions of the National Assembly are the representative, the legislative, the election and the control functions. In this sense the parliamentary oversight falls under the control function. The term "oversight" was chosen for the sake of greater precision, in line with the definition that Caparini offers. According to it, the oversight refers to the activities that assess the effectiveness and the lawfulness of the institutions' work. See: Caparini (2007): 9.

8 Compare: De Smet, P. Confidence is fine, control is better? Excerpt of the speech held at Community of Interest on the Practice and Organisation of Intelligence (Belgium) – December 2008. <http://goo.gl/y2U7cS> (comiteri.be).

cutive power; they oversee implementation of certain policies, i.e. the work of the executive power actors.

It is difficult to provide a comparative study of parliamentary practices due to their variety and due to specific features of some legal and institutional arrangements which have been established and developed in response to local policies. The oversight of the security sector can be under the authority of one single committee, as it was the case in Serbia until 2012. On the other hand, in some parliaments (Slovakia, Romania) there is one committee for each of the security sector institutions. This means that, apart from the military and the police, each security and intelligence service has a corresponding committee which oversees its work.⁹ The model in which one specialized parliamentary body oversees the work of all services is more frequent.

Whereas defence and home affairs (either jointly or separately) are typically subject to the oversight by the classic parliamentary committees consisting of the MPs who report on their activities to the parliament, the arrangements for the oversight of security and intelligence services are far more varied. It would be impossible to provide an exhaustive classification of parliamentary or parliament-related bodies that conduct oversight of the services. Depending on the way in which it is constituted, its composition, concretely defined competences and powers, these bodies can vary from classic committees, such as the one we have in Serbia in the current parliament, through combined commissions, which could include MPs and independent experts (e.g. Commission G10 in the German Bundestag), all the way to independent bodies which could be elected by the parliament (Norway, Belgium) or to the executive power, where the role of the parliament is limited to proposing the membership (CTIVD in the Netherlands, Commission for Security and Protection of Integrity in Sweden). Classic committees most often have legislative and oversight role, whereas the role of the independent (parliamentary) commissions is typically limited to oversight.

In the continuation we will first consider several cases of oversight of SIM implemented by security and intelligence services, and then we will look into the oversight of these measures in the operational police work.

9 European Parliament – Office for Promotion of Parliamentary Democracy (2013). Parliamentary oversight of Security Sector. [online] <http://goo.gl/tvmP9P> (europarl.europa.eu pdf): 28

Oversight of security and intelligence services

Most of European parliaments, including the Serbian National Assembly, have the power to oversee implementation of SIM. In some countries such a power is vested in the specialized independent bodies, whose members are elected by the parliament to whom they report. However, in many countries (e.g. Denmark, Portugal, the United Kingdom), the parliaments do not have such a power.¹⁰ The example of the British Parliament is an ambivalent one, since it has a very specific arrangement for the oversight of the security and intelligence agencies. The Intelligence and Security Committee (ISC) consists of the members of both Houses of the Parliament, but it is responsible directly to the Prime Minister, and only indirectly to the Parliament, through the Prime Minister. Although the ISC does not have the explicit power to oversee the operational work of the agencies, such a focus of the oversight is not explicitly forbidden. The main method of its work is investigation. The ISC has a General Investigator whose task is to investigate and report on certain aspects of the agencies' work. Typically former senior police officers are appointed to this post. The fact that it does not have the legislative power gives enough space to the ISC to initiate investigations on current issues. In October 2013 the ISC announced the review of the legislative framework which governs the security and intelligence agencies' access to private data and wider inquiry with the aim to establish "the appropriate balance between privacy and security in an internet age"¹¹. Still, the fact that the ISC is responsible to the Prime Minister, who can revise the contents of its report, is quite controversial and the ISC is often criticized by the British public for not being critical enough towards the executive power and the agencies¹².

As noted by one Conservative MP in the British Parliament, the oversight of the security and intelligence agencies must not only be effective, it also must be seen to be effective.*

* Tyrie, A. The Intelligence and Security Committee: A watchdog with no teeth or credibility. *The Independent*, 22 December, 2013. [online] <http://goo.gl/UUEpui>.

Some of the most praised examples of the oversight have come out of the scandals related to the agencies' work. Delegation for the Oversight of Intelligence Agencies (Geschäftsprüfungsdelegation) of the Swiss parliament, consisting of the members of both parliamentary houses, was established after two major scandals that happe-

10 Wills, A. et al. (2011). Parliamentary Oversight of Security and Intelligence Agencies in the European Union. European Parliament, Brussels, 2011: 115-116.

11 Intelligence and Security Committee of the Parliament. Press release. [online] <http://goo.gl/xayu0s>.

12 <http://www.newstatesman.com/politics/2013/12/intelligence-and-security-committee-governments-white-washing-body-choice>

ned at the end of 1980s and in early 1990s. One investigative committee of the parliament established that the Federal Police created around 700,000 files on persons and organizations on whom it secretly gathered data between 1945 and 1989.¹³ Not long afterwards, it was discovered that there were two secret agencies which were under no political control and whose work had previously been unknown to the public. The latter scandal was the focus of work of another investigative committee.¹⁴ Great role of the MPs in disclosing and investigating these cases indicated that there was a need for the regular and feasible parliamentary oversight of the intelligence agencies. This directly influenced establishment of the parliamentary body with very wide scope of powers, including unlimited access to all government's confidential data. Between 2008 and 2010 the Delegation used its power to conduct the investigation on the processing of the electronic data gathered through intelligence work within the country. The investigation established that part of the data were incorrect and irrelevant for the national security.¹⁵

In these cases the oversight is trusted with the bodies which consist of the MPs. There is another possibility as well, where the oversight is conducted by the independent commissions in which the experts participate after they have been appointed by the parliament. The advantage of such a model is in the fact that those who are in charge of oversight are more familiar with the legislative framework and the circumstances in which the agencies operate. This helps avoid the risk of the oversight body being caught up in the tensions between the government and the opposition.¹⁶ The example of such a model is the Belgian Standing Committee for Oversight of Intelligence Services. Members of the Committee (chair, two members and to alternates¹⁷) are appointed by the Belgian Senate, but the Committee is institutionally and operationally independent from the Senate. It is interesting that this Committee was already functioning when the law adopted in 2010 envisaged for the first time the application of special measures. It seems that they managed, without major difficulties, to make the oversight of these measures one of its key competences. The Committee can start investigations at its own initiative and upon the request of either of the two houses of parliament, of a ministry or other government institution, as well as based on a citizen's complaint. Finally, when instructed by a judiciary instance, it can inve-

13 Eidgenössisches Departement des Innern EDI/Schweizerisches Bundesarchiv BAR(2007,17.1).Die politische Polizei und der Staatsschutz. <<http://www.bar.admin.ch/archivgut/00591/00628/index.html>>.

14 Jahresbericht 2012 der Geschäftsprüfungskommissionen und der Geschäftsprüfungsdelegation der eidgenössischen Räte, 24.1.2013. [online]<<http://goo.gl/Nr7mqr>>(parlament.chpdf):3.

15 Geschäftsprüfungsdelegation (2012, 23. 8). Oberaufsicht über die Nachrichtendienste in der Schweiz. [online] <<http://goo.gl/MBUePZ>>(ennir.bepdf):2.

16 The weaknesses of the oversight done by the typical parliamentary committees are explained in more detail in Caparini, M. Controlling and Overseeing Intelligence Services in Democratic States. In: Born, H.&M. Caparini(ed.) (2007). Democratic Control of Intelligence Services: Containing Rogue Elephants. Aldershot: Ashgate Publishing, 3–24. See in particular p. 13–14.

17 The chair of the committee must be either a judge or a state prosecutor.

stigate whether some members of the services committed any abuses. A wide scope of authority of this body includes unlimited access to the data from the ongoing investigations, which is not a standard in the European practice.¹⁸ The success of this Committee is based on the competences of its members and the focus on the work of the agencies – something that the MPs could not afford, as well as on adequate administrative capacities. Apart from the Secretariat, which according to the latest data employs 14 staff¹⁹, the Committee has an investigative service, whose members are acting as assistant public prosecutors. In this way the Committee combines the legislative and judiciary powers during the oversight of the security services, but it still acts as an independent body.

The German Bundestag has the greatest powers when it comes to SIM. Within Bundestag there is Commission G10, named after the Article 10 of the Basic Law (*Grundgesetz*), which guarantees the right of confidentiality of letters and telecommunications. Commission 10 is in many aspects a unique establishment. It is a quasi-judiciary body placed under the parliamentary auspices. Its role is to control and oversee application of measures by which the security and intelligence agencies encroach upon the mentioned right. The members of the commission are elected by the parliamentary body in charge of oversight of the security services (Parlamentarisches Kontrollgremium), and the chair is expected to have passed a judicial bar exam. Members of the commission (four regular members and three alternates) can be the members of the Bundestag, but not necessarily. The commission issues approvals to implement the measures that limit the right of confidentiality of communications, which is its most important function. If one of the agencies decides to apply this measure, it submits the written request for approval to the Ministry of Interior. If the Ministry approves such a request, it is forwarded to the Commission to take a stand on it. If it is rejected, the measure cannot be applied. In case of extreme danger the Ministry can sanction the use of a special investigative measure without the Commission's consent, in which case it has to notify the chair of the Commission or his/her deputy within three days, whereas the Commission decides on the use of this measure at its first upcoming session. If the Commission rejects the measure, the Ministry is obliged to abort its application.²⁰ After giving the consent, the Commission monitors and controls the way in which the private data are gathered and processed

18 According to the data published in Wills et al. 2011, in the EU member states such an authority is given to the responsible bodies in the Netherlands and Portugal (also independent bodies), as well as in Bulgaria, Latvia and Slovenia (parliamentary committees). Wills, A. et al. 2011: 127-128.

19 According to the data in Wills et al. 2011, in 2011 this body had 10 staff members. For the sake of comparison, the ISC and the Italian COPASIR, which serve the MPs (i.e. the non-experts) had 6 staff members each at the same period of time. According to the data obtained by the BCSP on 26.12.2013 from Katarina Terzic, a Secretary to the Security Services Control Committee, this Committee at the moment had three other officers apart from the Secretary, and they at the same time worked for the Defence and Internal Affairs Committee.

20 Artikel10-Gesetz vom 26. Juni 2001 (BGBl.I.S.1254, 2298), das zuletzt durch Artikel 2 Absatz 4 des Gesetzes vom 6. Juni 2013 (BGBl.I.S.1482) geändert worden ist, Art. 15, Item 6.

by implementing SIM and gives the consent on whether the person on whom the data were gathered would be informed after the application of special measure has ceased. Finally, the Commission receives the complaints of the citizens and investigates whether in certain cases the measures which limit the right to confidentiality of letters were applied lawfully. The Commission G10 functions in a similar way as the courts in the Serbian judiciary system, but in the Commission's case the judge's position is further strengthened by the authority and legitimacy of the parliament as the elected body, and the control function (giving or denying consent) is merged with the oversight function (monitoring SIM implementation).

As one of the former Commission G10 members suggested, the oversight visits cannot be particularly effective if the Commission members do not know what they are looking at.*

* Tyrie, A. The Intelligence and Security Committee: A watchdog with no teeth or credibility. *The Independent*, 22 December, 2013. [online] <http://goo.gl/UUEpui>.

However, the case of Commission G10 shows that, in spite of developed legislative and institutional solutions, the oversight in practice can be hampered by different obstacles which require regular updating of the said solutions. The affair that arose when the whistleblower Edward Snowden revealed the scope of data collection done by the NSA and the GCHQ, revealed, among other things, that the British intelligence officers gathered information on the German citizens in cooperation with the German agencies²¹. This shows that the cooperation and exchange of data among different states' agencies remains a "black hole" for the democratic oversight. Furthermore, the initial reluctance of the MPs²², not only from the ruling CDU/CSU, but also from the largest opposition party (SPD), to question the issue of mass data collection indicates that the institutional solutions as such do not mean much if the oversight authorities do not want to implement them. Finally, speedy development of the telecommunications makes the oversight and control authorities powerless in comparison to the security and intelligence services if they do not have the technical expertise to match.

21 "BND gehörte zur Abhör-Allianz des britischen Geheimdienstes". *Zeit online*, 1.11.2013. <http://www.zeit.de/digital/datenschutz/2013-11/gchq-bnd-kooperation>

22 Barenberg, J. "Es muss Transparenz hergestellt werden". Interview with Ulrich Maurer, MP. *Deutschlandfunk*, 26.06.2013. [online] <http://goo.gl/SNTVLL>.

Oversight of the police and other actors applying SIM

Security and intelligence services are not the only institutions which implement SIM. The police also applies them during the investigations, but so do different financial institutions in charge of tax enforcement, prevention of money laundering and so on. Giving powers to the oversight authorities over the security and intelligence services, and neglecting other institutions which implement SIM, may lead to the situation in which some actors are under tight scrutiny, whereas the others are completely avoiding it. One of the ways to overcome this is to establish specialized commissions which would focus on the oversight of the SIM implementation or to give additional authorities to the parliamentary bodies specialized for monitoring the security services, which would enable them to oversee the application of SIM by all actors authorized by the law to do so. The Dutch Commission for Oversight of Intelligence and Security Services (CTIVD) is an independent body whose members are appointed by the royal decree upon the proposal by the Lower House of the Dutch Parliament. The CTIVD oversees the enforcement of the Law on Intelligence and Security Services (WIV). Since the law envisages the possibility that the security and intelligence agencies engage the police, the military police (De Koninklijke Marechaussee) and national tax administration, the Commission oversees the operations of these actors only when they perform the tasks delegated to them by the security and intelligence services.²³ The Slovenian Commission for Oversight of Security and Intelligence Service oversees the application of special investigative measures in the police work.²⁴ The shortcoming of this approach is that partial oversight of certain institutions does not allow wider overview of the main issues. On the other hand, the fact that the powers related to the oversight of police application of SIM are transferred to the committee that oversees the security services enables the efficient use of experiences and expertise of the committee that already oversees the ways in which the security and intelligence services implement SIM.

There are some good examples of a comprehensive oversight outside Europe. The committees for intelligence in both houses of the American Congress (*House Perma-*

23 The European Network of National Intelligence Reviewers (2011,21.12). Intelligence Review in the Netherlands. [online] <<http://www.ennir.be/netherlands/intelligence-review-netherlands>>; Act of 7 February 2002, providing for rules relating to the intelligence and security services and amendment of several acts (Intelligence and Security Services Act 2002), as amended by the Act of 2 November 2006 (Bulletin of Acts, Orders and Decrees 2006, 574), Art. 60 and 64. <<https://www.aivd.nl/english/aivd/the-intelligence-and/>>.

24 The Library of the National Assembly (14.5.2012). Defence and Internal Affairs Committee and Security Services Control Committee in the national assemblies. <<http://goo.gl/SslBnt>> (parlament.gov.rs pdf) <<http://www.parlament.gov.rs/narodna-skupština/organizacija-i-stručna-služba/biblioteka-narodne-skupštine.1505.html>>12. Wills, A. Et al.(2011): 95.

ment Select Committee on Intelligence and Senate Select Committee on Intelligence) are responsible for the oversight of all intelligence activities done by 17 institutions, including the Drug Enforcement Administration (DEA), Department of Energy and Department of Treasury²⁵. Although it is difficult to compare European and American political systems, it may be a good suggestion how to merge oversight of use of SIM.

There are some good examples of a comprehensive oversight outside Europe. The committees for intelligence in both houses of the American Congress (*House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence*) are responsible for the oversight of all intelligence activities done by 17 institutions, including the Drug Enforcement Administration (DEA), Department of Energy and Department of Treasury*. Iako je teško porediti evropske političke sisteme sa američkim, ovo može biti dobra sugestija kako objediniti nadzor nad primenom posebnih mera.

* Rosenbach, E.&A.J.Peritz(2009). Confrontation or Collaboration? Congress and the Intelligence Community. Belfer Center for Science and International Affairs, Harvard Kennedy School.[online] <http://belfercenter.ksg.harvard.edu/files/IC-book-finalasof12JUNE.pdf>.

The second argument for merging the oversight functions is the objective inability of the committees responsible for the home affairs to oversee the police work regularly. Even when separated from the defence committees, these committees have wide scope of authority, which, depending on the state, i.e. depending on the way in which “the home affairs” are governed, can include the migrations, lottery games, state administration procedures and so on. Considering this, it is not surprising that the legislative frameworks are typically less detailed when it comes to the committees responsible for the police oversight. Besides, the legislative responsibilities of the committee for home affairs limit the space for performing the oversight role. Where the parliamentary committees do not have legislative responsibilities this opens up the possibility for a comprehensive parliamentary oversight of different aspects of police work. The Home Affairs Committee of the House of Commons in the British Parliament is one of the so called select committees which oversee implementation of policies in various domains, i.e. the work of specific ministries. This Committee monitors the implementation of the Home Office policies, performance of administration and use of financial resources. Its work is particularly specific due to the fact that it can independently choose what is going to be investigated. Current investigations include of the Home Office’s Visa and Immigration Department and investigation on how the British police and the security agencies fight against terrorism. The latter investigation is focused on whether the Government’s capacities for fight aga-

25 Rosenbach, E.&A.J.Peritz(2009). Confrontation or Collaboration? Congress and the Intelligence Community. Belfer Center for Science and International Affairs, Harvard Kennedy School.[online] <http://belfercenter.ksg.harvard.edu/files/IC-book-finalasof12JUNE.pdf>.

inst terrorism are sufficient, which includes the capacities to prevent the use of telecommunications for the purpose of planning and executing the acts of terrorism.²⁶ It is indicative that the investigation does not include the questions on prevention of abuse and protection of human rights in fight against terrorism. The Committee was also recently criticized for the testimony of the *Guardian's* editor-in-chief on the data the paper obtained from Snowden, which was perceived by many as the pressure on the freedom of the media.²⁷

This case showed once again that the orientation and the reach of the parliamentary oversight of the security sector do not depend only on the legal and institutional solutions for the oversight, but also on the competence of the MPs who conduct the oversight.

In the cases when the responsible committees have legislative powers, the oversight of the police and prosecution's application of SIM is primarily done by the independent bodies. The independent bodies can be responsible to the parliament or the parliament can be involved in proposing the members of the independent bodies, which is the case with the mentioned CTIVD in the Netherlands. In Sweden the Commission for Security and Protection of Integrity oversees implementation of special investigative measures, such as secret surveillance of the persons, as well as the way in which the Swedish police service (which includes the security service within the police) deals with the personal data. The connection of the Riksdag (the parliament) and this Commission is an indirect one – the members of the Commission are appointed by the Government at the proposal of the political caucuses in the Riksdag.²⁸ The parliament can also be involved in the oversight of SIM implementation in the police work through annual reports that the independent bodies and the ministries submit. For example, the German Government (Ministry of Justice and Ministry of Interior) submit annual reports to the Bundestag on use of technical devices for surveillance of houses (e.g. recording, phone tapping) during the criminal procedure or to eliminate the danger.²⁹

26 Committee launches counter-terrorism inquiry. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/130723-counter-terrorism-new-inquiry/>

27 http://www.huffingtonpost.com/committee-to-protect-journalists/grilling-of-alan-rusbridg_b_4398995.html

28 This does not apply to the chair and deputy chair of the Commission, who must be the judges or have "the equivalent judicial experience".

29 See: Deutscher Bundestag 17. Wahlperiode. Bericht der Bundesregierung gemäß Artikel 13 Absatz 6 Satz 1 des Grundgesetzes für das Jahr 2012. Unterrichtung durch die Bundesregierung. Drucksache 17/14835, 17.10.2013. [online]<<http://goo.gl/E5Ec2B>>(bundestag.de pdf) <<http://dip21.bundestag.de/dip21/btd/17/148/1714835.pdf>>.

Where does Serbia stand?

The Serbian Constitution³⁰ (Art. 41) guarantees the confidentiality of letters and other means of communication, and the “derogation shall be allowed only for a specified period of time and based on decision of the court if necessary to conduct criminal proceedings or protect the security of the Republic of Serbia, in a manner stipulated by the law”. The definitions of special measures of data collection vary depending on the reasons for their application and the actors who are applying them. Depending on the purpose of data collection – whether for protection of national security or within the criminal proceedings – there are two legal regimes which govern the application of SIM. When it comes to the protection of national security, SIM are regulated by the Law on Military Security Agency and Military Intelligence Agency³¹, and the Law on Security-Intelligence Agency³² respectively. Special investigative measures applied by the police in the criminal proceedings are also referred to as the special evidence-gathering activities and their application is governed by the Criminal Procedure Code.

The Law on Military Security Agency and Military Intelligence Agency stipulates “special procedures and measures of secret data collection”. The Law on Security-Intelligence Agency stipulates in its Article 9 that the Agency “employs appropriate operational methods, measures and activities as well as appropriate operational and technical means, to collect information for the purpose of counteracting activities aimed at undermining the constitutional order of the Republic of Serbia and endangering national security”. Also, according to the Article 13 of the Law on Security-Intelligence Agency, the Director of the Agency can, based on the previous court decision, decide on application of measures which encroach on the principle of confidentiality of letters and other means of communication.

Parliamentary oversight of the legality of implementation of special procedures and measures for secret data collection, which is conducted by the responsible committee, is explicitly stipulated in the Law on the Bases Regulating Security Services³³ (Art. 16) and the Standing Rules and Procedures of the National Assembly of the Republic of Serbia³⁴ (Art. 66 which regulates responsibilities of the Security Services Control Committee was practically copied and pasted from the Article 16 of the

30 Constitution of the Republic of Serbia, *the Official Gazette of the Republic of Serbia*, no. 98/2006.

31 Law on Military Security Agency and Military Intelligence Agency. *The Official Gazette of the Republic of Serbia*, no. 988/2009, 55/2012 – decision of the Constitutional Court and 17/2013.

32 Law on Security-Intelligence Agency. *The Official Gazette of the Republic of Serbia*, no. 42/2002 and 111/2009.

33 Law on the Bases Regulating Security Services. *The Official Gazette of the Republic of Serbia*, no. 116/2007

34 Standing Rules and Procedures of the National Assembly of the Republic of Serbia. *The Official Gazette of the Republic of Serbia*, no. 52/10.

Law on the Bases Regulating Security Services). The Security Services Control Committee, which in the current parliament functions separately from the Defence and Internal Affairs Committee, adopted in early 2013 a decision which closely regulates the ways in which the oversight of security services is done, and in line with this decision it conducted oversight visits to the Security-Intelligence Agency, Military Security Agency and Military Intelligence Agency. As stated in the documents of the Committee, the primary goal of the visits was to oversee constitutionality and legality of the application of special measures and procedures for secret data collection.

CONSTITUTIONALITY OF THE LAW ON SECURITY-INTELLIGENCE AGENCY AND LIMITS OF PARLIAMENTARY INTERVENTION

At the end of December 2013 the Serbian Constitutional Court decided that the provisions of Art. 13, 14 and 15 of the Law on Security-Intelligence Agency (BIA) were not in adherence with the Constitution. The Constitution Court decided that the disputed provision of the Article 13 of the Law, which prescribes the deviation from the principle of inviolability of the confidentiality of the letters and other means of communication, was not formulated clearly and precisely enough. The Court also underlined that “regardless of the fact that the Security-Intelligence Agency performs the tasks that presume a high level of confidentiality, the Constitutional Court considers that the provisions of the Law, which govern the operations of the Agency, must be predictable to a reasonable degree under given circumstances”. The Court postponed publication of this decision in the Official Gazette for four months since its adoption, in line with the Article 58, Paragraph 4 of the Law on Constitutional Court.

In the meantime this case has had a new twist in the parliament when the Security Services Control Committee sent a written request to the Committee for Constitutional Issues and Legislation to request from the Constitutional Court further delay in publishing their decision because of the announced early parliamentary elections. Namely, the parliament would not have been able to adopt appropriate amendments to the law in a timely manner, which could have created a vacuum in which any application of SIM by the BIA would be unconstitutional. In the second attempt the Committee for Constitutional Issues and Legislation adopted the decision to send a request to the Constitutional Court in which a six-month delay in publication was requested instead of an initial four-month delay.

The Criminal Procedure Code³⁵ governs the application of special evidence-gathering methods which include secret surveillance of the communications, secret surveillance and recording, conclusion of mock business deals, computer data search, controlled deliveries and use of undercover agents (CPC, Articles 166-187). The Law does not envisage external oversight of the legality and purposefulness of the application of these measures. The Law on Police³⁶ (Article 9) envisages the parliamentary oversight of the police work, but it does not specify the parliament's authorities or the powers in the oversight. The Article 49 of the Standing Rules and Procedures of the National Assembly, which establishes the responsibilities of the Defence and Internal Affairs Committee, does not make reference to the oversight of police work. At the 13th session of the Committee, the chair announced upcoming visits to the institutions whose work is under the responsibility of the Committee, but it was not precisely defined which aspect of police work, i.e. the Ministry of Interior's work would be the focus of attention.³⁷

The weakest point of the oversight is the oversight of the actors which work under the Ministry of Finance and which have certain authorities and powers similar to the ones of the security actors. Although the Anti-Money Laundering Administration, Tax Police and the Customs Administration have *de facto* possibility to apply SIM, the oversight of application of the measures by these institutions has not been regulated yet.³⁸

35 Criminal Procedure Code, *the Official Gazette of the Republic of Serbia*, no. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013

36 Law on Police, *the Official Gazette of the Republic of Serbia*, no. 101/2005, 63/2009 – decision of the Constitutional Court and 92/2011

37 Authors own notes based on the internet live stream of the 13th session of the Security and Internal Affairs Committee, 6.11. 2013

38 See: Ođanović, G. Parliamentary oversight and control of the security sector in Serbia. In: Hadžić, M. and S. Stojanović Gajić (ed.) (2012). *The Yearbook of Security Sector Reform in Serbia*. Belgrade: Belgrade Centre for Security Policy/ Official Gazette, 313–335:326.

Instead of conclusion

- Although parliamentary oversight of special measures for data collection is still not established as a norm, in most European countries this type of oversight is stipulated in the relevant regulations and so far it has become, more or less, established in practice. This particularly refers to the oversight of security and intelligence agencies, although there are weak points there as well, such as oversight of exchange of information with foreign services and other institutions. On the other hand, the oversight of special investigative measures in the police work is most often done by the independent regulatory bodies, in whose work the parliaments can be indirectly involved through appointing or proposing the members of these bodies and/ or receiving the annual reports from them.
- The arrangements for oversight of SIM implementation, as well as the oversight of the security sector – especially the security and intelligence agencies – are varied; therefore it is impossible to compare them in a way which would denote one model as better than the other or the best of all. However, inclination towards certain solutions for specific problems could be useful. One example would be the establishment of (unified or specialized) oversight of SIM implementation in the work of all actors who are authorized by law to apply them/ The other possibility is to find the ways for the parliaments whose committees for internal affairs have wide scope of authority (such as the case in Germany) to conduct some form of oversight of SIM used in the police work.
- The overview of current parliamentary practices of oversight indicates that there are several factors that could impact the effectiveness of the oversight. The oversight is limited by the institutional and legal framework in which it is conducted. However, the widest possible framework is not sufficient for effective oversight if the oversight bodies do not have adequate capacities. This conclusion is common for all the analyses of the parliamentary oversight, but it becomes particularly important when it comes to special measures of data collection under the circumstances of rapid technological development. The MPs without adequate knowledge or expert support can only formally conduct oversight of SIM implementation. Finally, the way in which the oversight would be conducted is conditioned by the values of those who assume the oversight roles. If they do not see possible infringements of human rights as a risk in SIM implementation, then none of the above mentioned factors would be able to ‘work’. Judging by the practices of some consolidated democracies, the longest period of time is necessary to fulfil this particular condition.

- Serbia follows the “European trends”, in a certain way, when it comes to oversight of SIM implementation. On one hand there is an established legislative and constitutional framework for parliamentary oversight of special procedures and measures used by the security services. The decision that was adopted by the Security Services Control Committee, which regulates more closely the methods of oversight, as well as the visits to security services conducted in line with this decision, are the steps towards establishing the practice of oversight of SIM in use. On the other hand, the parliamentary oversight of police application of special evidence-gathering methods, as well as how the financial sector actors apply these measures, have not been regulated yet by the laws or by the Standing Rules and Procedures of the National Assembly. This, for the time being, does not provide the basis for establishment of adequate practice.

